



April 30, 2004

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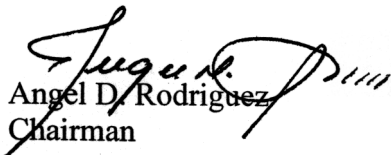
Consistency Determination Appeal
CZ-2001-0529-117
Villa Marina Yacht Harbour
Fajardo, Puerto Rico

Dear Mrs. Holt:

Thank you for the granted extension to submit our brief regarding the appeal of the case at reference. Enclosed you will find the Puerto Rico Planning Board brief in response to the Villa Marina Yacht Harbour's appeal.

If you have any question or need more information about this matter do not hesitate to contact Ms. Rose A. Ortiz at (787)-723-6200 ext. 2020 or (787)-726-0289.

Cordially,


Angel D. Rodriguez
Chairman

Enclosures: PRPB Appeal Brief and Annexes

c: Mr. Jose E. Rosario, USACE
Mr. Eduardo Ferrer, Villa Marina Yacht Harbour Inc.

Puerto Rico Planning Board's Brief
Case Number CZ-2001-0529-117
Joint Permit Application Number: 179
USACE No. 198800516 (IP-VG)
Apellant: Villa Marina Yacht Harbour Inc.
Lawyer: Eduardo J. Ferrer Ramirez

I. Background and History

Villa Marina Yacht Harbour Inc. through its agent Gustavo Adolfo Rodríguez submitted an application for the construction of a marina with 125 boat slips and a breakwater. The proposed breakwater has dimensions of 398 feet long by 18 feet height, 35 feet wide in the base and 15 feet wide in the top. The new marina is proposed as an expansion of the existing Villa Marina Yacht Harbour Marina and it is located at Sardinera Bay in Fajardo, Puerto Rico.

The above decribed project was previously submitted to the Puerto Rico Planning Board (PRPB) through the following applications:

Case Number	Date in which the application was submitted	PRPB Determination and Status
CZ-1988-0512-172	May 12, 1988	A Consistent Certificate with the Puerto Rico Coastal Management Program was emitted on November 10, 1988. The project was not constructed and the USACE Permit expired. Therefore a new Consistency Certificate and permit is required in order to perform the proposed activity.
CZ-1995-0127-040	February 1, 1995	Declared not Consistent with the PRCMP because the applicant did not submitted requested information.
CZ-2000-0825-010	August 25, 1999	Declared not consistent with the PRCMP on February 7, 2000 because of insufficient information which is necessary to determine the consistency of the activity with the PRCMP. The Environmental Quality Board and the Department of Natural and Environmental Resources requested an Environmental Impact Statement that was not provided.
CZ-2000-0523-078 Joint Permit Application Num: 063	May 23, 2000	Declared not consistent with the PRCMP on February 7, 2001. The Process of Environmental Impact Assessment according to the PR Environmental Policy law has not been completed.

Copies of the documents regarding these applications are enclosed as annex number one (1).

The application at reference (CZ-2001-0529-117) was submitted by the applicant at the Department of Natural and Environmental Resources (DNER) on April 3, 2001. The DNER sent a letter to the applicant dated May 9, 2001 in which it is notified that the application for Submerged Land Use Concession was considered incomplete because it did not include the information that was requested by this agency in letters dated November 23, 1999, August 31, 2000 and February 27, 2001. (Letters enclosed as annex number 13).

The Environmental Quality Board sent a letter to the applicant's agent (Gustavo Adolfo Rodríguez) dated April 6, 2001 (annex 2) in which this agency informed that the Joint Permit Application was incomplete and that the following information should be submitted in order complete the application:

- 1- Proponent agency with respect to compliance with Article 4(c) Law #9 of June 18, 1970.
- 2- Evidence of Compliance with the Article 4(C).

On June 11, 2001, the PRPB sent a letter (annex 3) notifying to the applicant's agent that the application was incomplete according to §930.58 of 15 CFR part 930 and that the applicant shall submit the following information and documents:

1. Copy of the Environmental Quality Board (EQB) Endorsement regarding compliance with the Article 4c of the Environmental Policy Law.
2. Endorsement letters or comments from the agencies to the Environmental Impact Statement document.
3. Marine currents studies in order to prove that the breakwater is adequate and that it will not have negative impacts on other marinas that exists in Sardinera Bay.
4. Diagram done by a Surveyor showing the dimensions and location of the proposed expansion in relation to Sea Lovers Marina approved expansion.

On April 4, 2002, the applicant submitted a letter dated April 5, 2002 (annex 4) in which he informed his intention to withdraw the site consultation number 2000-24-0340-JPU for the construction of a hotel with the marina expansion. The applicant expressed his interest to continue with the evaluation of the marina expansion through the application number CZ-2001-0529-117 but the required endorsement of the Environmental Quality Board and other requested information was not submitted. The PRPB's letter (annex 3) clearly specifies that the evaluation period shall not begin until the requested information is submitted. Although the applicant withdrew the site consultation at the PRPB, he had the responsibility to provide the required information to the Department of Natural and Environmental Resources in order to complete the Environmental Impact Statement Document according to the DNER requirements and obtain the EQB endorsement.

On April 23, 2002 the Environmental Quality Board sent copy of a letter (annex 5) dated April 17, 2002 in which it is informed to Mr. Eduardo Ferrer that in order to complete the Joint Permit Application it is required to obtain a new certification of compliance with the Article 4-C of the Puerto Rico Environmental Policy Law.

On December 17, 2002 (annex 6) the applicant submitted another letter to the PRPB but the required endorsement from the EQB was not submitted, therefore the application was not considered complete.

On January 30, 2003 (annex 7) the applicant met with Ms. Rose A. Ortiz, technician of the Coastal Zone Unit and Mr. Nelson Vélez, member of the PRPB. As result of this meeting the following agreements were established:

- 1- For the purpose of beginning the evaluation period of the Application for Consistency Certificate the PRPB exempted from the requisite of submitting the EQB endorsement letter. Notwithstanding the applicant was advised that this exception does not exclude him of complying with this requisite.
- 2- The applicant shall submit seven (7) copies of the new project plan and description and description and information regarding the parking spaces that will be provided for the new marina.
- 3- The applicant shall address the concerns expressed by consulted agencies and Mr. Richard Vito.
- 4- The applicant shall submit copy of any new information submitted to the U.S. Army Corps of Engineers.

The applicant submitted the requested information on March 5, 2003 and the application was declared complete. During the evaluation period of the application the following comments were received from consulted agencies and public (annex 8):

- ❖ **Department of Natural and Environmental Resources (DNER):** this agency did not send their comments during the granted period but the PRPB sent them the most recent submitted information. A meeting was held on August 21, 2003 with the participation of the PRPB Coastal Zone Unit technicians and the DNER representatives in order to discuss the case. Finally, the DNER sent a letter dated September 3, 2003 in which this agency informed that the applicant had been notified in four occasions (letters dated November 23, 1999, August 31, 2000, February 27, 2001 and May 9, 2001) that the submitted information did not discussed their concerns about the project. Regarding the impacts on navigation, the DNER commented that they should wait for the Coast Guard comments. The DNER also informed that the submitted studies (Bathimetric study, Wave Refraction and Diffraction Study and Hidraulic Breakwater Stability Analysis) were referred to the U.S. Army Corps of Engineers for their review and comments, so additional time will be required for the evaluation of these documents.
- ❖ **Environmental Quality Board (EQB):** this agency confirmed that the site consultation was filed by request of the applicant so they will not continue with the evaluation of the submitted environmental document. *The applicant originally submitted the proposed marina as part of a mayor project that included a hotel. The PRPB was carrying out the evaluation of a Site Consultation Permit for the Hotel. As part of the evaluation process of this permit the applicant submitted an environmental document to comply with the Environmental Policy Law, but the applicant withdrew the application for the site consultation permit on April 5, 2002.*

- ❖ **Fish & Wildlife Service (FWS):** during the evaluation of the proposed dredging for the existing inland marina this agency had express that they do not have records of endangered species. Notwithstanding they sent a letter dated September later expressing concern for the potential impacts of the proposed Villa Marina and other proposed expansions on the endangered manatee. They strongly recommended to consider the cumulative impacts of the proposed marina expansions and new marina proposal at the area.
- ❖ **National Marine Fisheries Service (NMFS):** this agency determined that the proposed expansion will not have significant impact on fishery resources at Sardinera Bay. There is neither aquatic vegetation nor coral reefs within the project area.
- ❖ **SHPO:** they informed that a Phase I study is required to complete the evaluation according to section 106 of the Historic Preservation Act.
- ❖ **Sea Grant:** expressed no objection because they think that it is better to extend existing marinas than impact other virgin areas with higher ecological value.
- ❖ **Maternillo and Mansión del Sapo Fishermen Association:** they submitted a letter with 99 signatures expressing objection to the proposal.
- ❖ **Mr. Frank D. Inserni** expressed objection to the proposed marina expansion. He is concerned about the impacts that the proposed expansion will have in the water quality of the bay, marine ecology, boat traffic, and terrestrial vehicle traffic. He recommended that the need for more boat slips shall be evaluated because within the Municipality of Fajardo there are four marinas for medium sized boats and there are multiple boat parking lots that will satisfy the demand for this service.
- ❖ **Mr. Richard Vito (owner of Sea Lovers Marina):** expressed objection to the proposal. He is concerned about the impact that the proposed project will have in his approved marina expansion of 46 slips. He argues that his approved expansion is not being considered and that the project plans submitted by the applicant do not correspond to the real dimensions of the Sardinera Bay. The most recent submitted project plans and drawings did not contain the correct distances between the approved Sea Lovers expansion and the new Villa Marina proposal. He expressed concerns about the restriction of space and increase in hazard to navigation because of the presence and location of the new breakwater and facilities among others. He also raised many issues related to the viability of the proposed breakwater.

The PRPB sent a letter to the applicant dated July 9, 2003 including copy of the letters submitted by the above mentioned agencies and general public (annex 9). In this letter the PRPB expressed the following concerns:

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- 1- The Department of Natural and Environmental Resources (DNER) is the state agency that has the responsibility to guard and administer the maritime zone and submerged lands. The application for the required "Concession for Private Use of the Maritime Zone and Submerged Lands" is incomplete. The endorsement of this agency is very important because the impact of the proposed new marina on submerged lands (public property) is considerable.
 - 2- The fishermen and other citizens expressed the following concerns:

Increase of traffic: the proposed 125 slips expansion will increase traffic especially during long weekends (holidays).

Restriction of public space and anchorage area for the fishermen: this expansion must not have a negative impact in other existing activities at the area.

Conflict between the proposed expansion and approved Sea Lovers Marina expansion: Mr. Richard Vito expressed concern because the space that will remain between the proposed expansion and his marina is not sufficient for the turn of boats that uses his marina facilities.

Insufficiency of parking spaces: Villa Marina Yacht Harbour actually offers service for more than 200 of boats and it only has 108 parking spaces.

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- 3- The proposed expansion requires to be evaluated through a site consultation: this water dependant use involves other land uses and activities that should be evaluated by the PRPB. The documents related to the site consultation have not been updated.
 - 4- The viability of the proposed breakwater is highly questionable. The U.S. Army Corps of Engineers and the DNER have not endorsed it. The studies that were included within the Environmental Impact Statement Document were prepared for other marina and it does not simulate the real conditions that would exist according to the location and design of the breakwater.
 - 5- The U.S. Army Corps of Engineers in its May13, 2002 letter expressed concern about the potential impacts of this project in water quality, changes in erosion and sedimentation patterns and navigational security.

The applicant submitted a letter dated July 29, 2003 (annex 10) answering the PRPB's letter, and a copy of the Bathimetric, Wave refraction and Hydraulic Stability Studies. The studies were sent to the DNER on August 14, 2003.

A meeting between functionaries of the PRPB and the Department of Natural and Environmental Resources was held on August 21, 2003 in order to discuss the case.

The applicant sent a letter dated August 22, 2003 (annex 11) expressing that Villa Marina Yacht Harbour Inc. agrees to extent the evaluation period of the application until september 27, 2003. The PRPB informed the U.S. Corps of Engineers about this agreement in a letter dated August 27, 2003 (annex 12).

The DNER sent a letter dated September 3, 2003 (annex 13) in which this agency expressed the following:

“By means of communications dated November 23, 1999, 31 August 31, 2000, February 27, 2001 and May 9, 2001, the Department of Natural and Environmental Resources notified the applicant that the information presented/displayed until that moment did not discuss the indications emitted by this agency.

Later, meetings have been held in which it has been notified that US Coast Guard (USCG) is interested in commenting on the ship canal that would remain from the proposed marina expansion. According to comments emitted by the DNER Commissioner of Navigation, the DRNA must wait for the technical information that will be emitted by the USCG regarding to matters related with navigation.

With regards to the three technical studies (Bathymetric Analysis for Villa Marina, Fajardo; Wave Refraction/Diffraction Analysis for Villa Marina Yacht Harbor, Sardinera Bay, Fajardo; and Hidraulyc Stability Analisis for Proposed Brakewater for Villa Marina Yacht Harbor, Fajardo) referred by the PRPB on August 14, 2003, it is necessary additional time to comment such. We have referred the studies to the U.S. Army Corps of Engineers, which has the required specialized personnel. Once we receive such we will come to express itself.”

The PRPB proceeded to evaluate the information at file and emitted a determination dated September 26, 2003 (annex 14) objecting the application for Consistency of Villa Marina Yacht Harbour's expansion. The PRPB objection was based in the fact that there remain many unresolved issues that are related with the PRCMP policies. These are the following:

- 1- In order to ensure the consistency of the proposed marina expansion with these policies it is necessary to obtain the required compliance with the article 4c of the Environmental Policy Law (Law Number 9) because this is the mean established by the Puerto Rico Commonwealth for the evaluation and consideration of environmental impacts. The PRCMP recognizes the Law Number 9 of June 18, 1970 as one of the means of exerting commonwealth control (see appendix B of the PRCMP). The Environmental document shall be reviewed in order to include the most recently submitted studies, address the pending issues and complete the DNER requirements. The applicant shall obtain the EQB endorsement about compliance with the Article 4(c) of Environmental Policy Law through the review process of the Submerged Land Use Concession permit in the DNER.

- 2- The submerged land where Villa Marina expansion is proposed is a coastal resource that belongs to the Puerto Rico Commonwealth. It is part of a public space that is shared by Villa Marina Yacht Harbor, the fishermen, Sea Lovers Marina, Puerto Chico Marina, Dos Marinas Tower residents and all the Puerto Rico people. Everybody have equal right to enjoy it. Villa Marina Expansion shall not have a significant impact on the public use of these waters and the existing activities. Therefore, a better justification in terms of public benefit shall be included within the documents for the evaluation of this proposal. The impacts on public use shall be carefully evaluated. The proposed expansion shall also be in harmony with the other existing marinas.

II. Discussion of the Appeal Grounds According to 15 CFR §930.121

1. Does the activity further the national interest as articulated in section 302 or 303 of the CZMA, in a significant or substantial manner?

According to §302 (c) of the CZMA the increasing and competing demand upon the lands and waters of our coastal zone occasioned by population growth and economic development, including requirements for industry, **commerce**, residential development, **recreation**, extraction of mineral resources and fossil fuels, transportation and navigation, waste disposal, and harvesting of fish, shellfish, and other living marine resources, have resulted in the loss of living marine resources, wildlife, nutrient-rich areas, permanent and adverse changes to ecological systems, **decreasing open space for public use, and shoreline erosion.**

According to §303 of the CZMA it is national policy:

(C) the management of coastal development to improve, safeguard, and restore the quality of coastal waters, and to protect natural resources and existing uses of those waters,

(D) priority consideration being given to coastal-dependent uses and **orderly processes for siting major facilities** related to national defense, energy, fisheries development, **recreation**, ports and transportation, and the location, to the maximum extent practicable, of **new commercial and industrial developments** in or adjacent to areas where such development already exists,

(E) public access to the coasts for recreation purposes,

Regarding the above mentioned policies of the Puerto Rico Coastal Zone Management Program (PRCMP) establishes the following:

- 30.0 To protect natural, environmental and cultural resources from destruction or irreparable damage resulting from misuse, or from lack of foresight to address the adverse impact of other activities.**

- 30.01 Reduce the adverse impact of pollution on natural resources by identifying and controlling the causes and sources of said pollution.**
- 30.02 Control the activities involving land development, construction, and land subdivisions which may adversely affect water quality...**
- 30.07 Avoid the unnecessary loss, because of the introduction of new activities or the authorization of subdivisions, of future options in the use of resources, bearing in mind the following objectives:**

Avoid building structures in beach areas, discourage activities or land subdivisions in adjacent areas where they may impede or hinder free access to beaches; and encourage free enjoyment of panoramic views, free access to the sun and enjoyment of these areas by all the people.

According to the Appendix B of the PRCMP and Rutinary Program Changes the state laws and regulations that are means through which the Commonwealth of Puerto Rico exerts control on land and water uses, and are related with the previously mentioned PRCMP policies are the following:

Environmental Quality Board:

Public Environmental Policy Act (Law Number 9 of June 18, 1970): Article 3 of this law establishes that the Commonwealth of Puerto Rico being aware of the profound impact of man's activity in the interrelations of all the components of his natural environment, especially the great influences of the populational growth, the high density urbanization, the industrial expansion, the resources exploitation, and the new and diffused technological progress, further acknowledges the critical importance of restoring and maintaining the environmental quality in behalf of the total welfare and development of man, declares that it is continuous policy of the commonwealth, including its municipalities, in cooperation with interested public and private organizations, to use every practical means and measures, including technical and financial aid, with the purpose of encouraging and promoting general welfare, to create and maintain the conditions under which man and nature may exist in productive harmony and to comply with the social and economic needs and any other needs which might arise with present and future generations of Puerto Ricans.

The Article 4(C) of Law Number 9 establishes: "It is authorized that to the fullest extent possible, all policies and public laws in force be interpreted, applied, and administered in strict accordance with the public policy set forth in this chapter. All departments, agencies, public corporations, municipalities and instrumentalities of the Commonwealth of Puerto Rico and its political subdivisions are likewise directed, on the appliance of this act, to comply with the following regulation:

(C) Include every recommendation or report on proposed legislation and issue, before performing any action or advertising any governmental decision which significantly affect the environmental quality, a written and detailed statement for:

- (1) the environmental impact of the proposed legislation, of the action to be performed or the decision to be promulgated;
- (2) any adverse environmental effects which cannot be avoided should the proposal be implemented, should the action be performed or the governmental decision promulgated;
- (3) alternatives to the proposed legislation, or the action or governmental decision in consideration.
- (4) the relation between local short-term uses of man's environment and the maintenance and improvement of long term productivity, and
- (5) any irrevocable or irreparable commitment of the resources involved in the governmental action if performed or in the decision if promulgated.

Before the agency concerned includes or issues the proper statement of environmental impact, the officer in charge shall consult and obtain the opinion with regard to the proposed legislation, the action to be taken or the governmental decision to be promulgated that any other government agency with jurisdiction over the environmental impact of said legislation, action or decision may have. Copies of such environmental impact statement and the opinions of the agencies consulted shall be made available to the Board on Environmental Quality, to the Governor and to the legislative bodies. Also, they shall be made available to the public and accompany the legislative proposal, action or decision for the proper process of examination and study through the government agencies. The Board on Environmental Quality is hereby empowered to approve regulations to implement the provisions of this subsection.

Department of Natural and Environmental Resources (DNER):

Law No. 23 of June 20, 1972: According to Article 5(h) of this law, the Department of Natural and Environmental Resources has the responsibility to exert monitoring and conservation of territorial waters, the lands submerged under them and the marine-terrestrial zone, to grant franchises, permissions and licenses of governmental function for its use and advantage and to establish, by means of regulation, the rights to pay for the private use of these lands.

Law of Waters of June 3, 1976 (new water law): Article 4 of this law establishes that "all waters and bodies of Puerto Rico are hereby declared to be the property and wealth of the People of Puerto Rico. Their use, utilization and development shall be subject to the provision of this chapter and of regulations prescribed there under". According to Article 5: "It is function of the Secretary of the Department of Natural and Environmental Resources: (c) To promulgate the criteria about the best, most beneficial and most reasonable use of the waters and to establish the consumption priorities which shall be followed in the administration of the permit".

As it was previously mentioned, the proposed marina expansion does not further the national interest because the process established by the state (according to the Environmental Policy Law) for the evaluation of this kind of project has not been completed. This marina expansion is not a project of public interest; it is private activity. Therefore the activity has not being proven to outweigh the adverse coastal effects separately or cumulatively and neither is necessary in the interest of national security according to 15 CFR 930.122

3- Is there a reasonable alternative available that would permit activity to be conducted in a manner consistent with enforceable policies of Puerto Rico's coastal zone management plan?

The PRPB objection letter (September 26, 2003) clearly specifies that in order to make the Villa Marina Yacht Harbor expansion consistent with the PRCMP:

- The Environmental document shall be reviewed in order to include the most recently submitted studies, address the pending issues and complete the DNER requirements.
- The applicant shall obtain the EQB endorsement about compliance with the Article 4c of the Environmental Policy Law. This process shall be completed within the review process of the DNER permit for Submerged Land Use Concession. The DNER shall be the proponent agency for this proposal.

) In order to prove that the proposed marina expansion is consistent with the PRCMP it is necessary that the DNER completes their evaluation of the Bathimetric, Wave refraction and Hydraulic Stability Studies that were sent to this agency during the evaluation process. It is also necessary to complete the environmental document according to DNER instructions in order to submit it to the Environmental Quality Board and obtain the endorsement about compliance with the Article 4c of Law Number 9 of June 18, 1970.

CONCLUSION

The proposed Villa Marina Yacht Harbor expansion is a private activity that has the potential to adversely impact the water quality and public use of the Sardinera Bay waters. According to applicable laws, it is responsibility of the state to control the establishment of private activities in order to guarantee safety, well-being and enjoyment of public domain goods for present and future generations. As it was previously mentioned the state has established a permit process in which the DNER Secretary evaluates Concessions for use of the submerged lands. According to Law Number 9 and applicable regulations administered by the Environmental Quality Board, this kind of state permit, as most of the governmental permits and decisions in the Commonwealth of Puerto Rico has to comply with the evaluation of the environmental impacts through the corresponding environmental document.

The Department of Natural and Environmental Resources shall be the proponent agency for compliance with Law Number 9 because according to previously mentioned Puerto Rico Commonwealth state laws, they have the responsibility to guard and administer the public and private uses at maritime zone, submerged lands and territorial waters. The DNER have neither concluded their evaluation nor expressed a position regarding the viability of the Villa Marina Yacht Harbor expansion proposal yet. For this reason and the lack of evidence about compliance with Law Number 9, the Puerto Rico Planning Board cannot determine the consistency of the proposed Villa Marina Yacht Harbor project with the PRCMP. Considering the above mentioned facts, the Puerto Rico Planning Board recommends to coordinate with the DNER in order to conclude the evaluation of the most recently submitted studies (Bathimetric, Wave refraction and Hydraulic Stability Studies) and provide the applicant the required orientation for completing the environmental document according to their requisites. This in order to obtain the required endorsements for compliance with the enforceable state laws according to the PRCMP.

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ANNEX DOCUMENTS LIST

ENCLOSURE DESCRIPTION	NUMBER
Documents related to previously submitted applications	1
April 6, 2001 letter from the Environmental Quality Board (EQB)	2
June 11, 2001 letter from the Puerto Rico Planning Board (PRPB)	3
April 5, 2002 letter from Mr. Eduardo Ferrer	4
April 23, 2002 letter from the EQB	5
December 17, 2002 letter from Mr. Eduardo Ferrer	6
January 30, 2003 letter from the PRPB	7
Letters submitted by the consulted agencies and public during the evaluation process	8
July 9, 2004 letter from the PRPB	9
July 29, 2003 letter from the applicant	10
August 22, 2003 letter from the applicant agreeing to extend the review period	11
August 27, 2003 letter from the PRPB informing the US Army Corps of Engineers about the agreement to extend the review period	12
Department of Natural and Environmental Resources letters	13
September 26, 2003 Federal Consistency Determination from the PRPB	14